NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESTATE OF TOMAS B. AGUIRRE, a probate estate, by and through Albert C. Aguirre, Special Administrator,

Plaintiff - Appellant,

v.

CHRISTOPHER T. KORUGA; ANA MARIA KORUGA, husband and wife, and the marital community comprised thereof; KORUGA AND ASSOCIATES, a Washington corporation; TOPMAN SEATTLE CORPORATION, a Washington corporation; TOPMAN FELLOW CORPORATION, a Washington corporation; THE AGUIRRE FOUNDATION, a Washington corporation,

Defendants - Appellees.

No. 04-35411

D.C. No. CV-99-01281-RSL

MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted September 13, 2005
Seattle, Washington

[*]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: SCHROEDER, Chief Judge, ALARCÓN and KLEINFELD, Circuit Judges.

This protracted litigation arises out of a family dispute over more than four million dollars. When it was before a panel of this court in 2002, we held that, although the power of attorney granted to Defendant-Appellee, Ana Maria Koruga, did not expressly state that she was granted the power to make gifts, under Washington law, the court could consider extrinsic evidence that the grantor intended to convey that power. See Estate of Aguirre ex rel. Aguirre v. Koruga, 42 Fed. Appx. 73 (9th Cir. 2002).

Pursuant to that decision, the district court conducted a jury trial. The jury apparently concluded there was a power to make gifts, because it entered a verdict in favor of the Korugas and against the Plaintiff-Appellant, Estate of Aguirre. The jury was instructed to consider the extrinsic evidence pursuant to the parties' stipulated instruction. This second appeal followed that jury verdict.

The Estate argues essentially that the district court had it right the first time in ruling in favor of the Estate and against the Korugas, relying on the language of the power of attorney. The Estate contends that the Washington power of attorney statute supports its view. See RCW § 11.94.050 ("Although a designated attorney in fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney in fact or agent shall have all

the powers the principal would have if alive and competent, the attorney in fact or agent shall not have the power...unless specifically provided otherwise in the document:...to make any gifts of property owned by the principal.").

We have already ruled against the Estate. The issue before us, therefore, is whether this case fits within the narrow exceptions to the established doctrine that a panel must follow the law of the case decided by a previous panel. See In re Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996). The first issue thus becomes whether the prior panel's decision was clearly erroneous. The prior panel relied on Estate of Lennon v. Lennon, 29 P.3d 1258 (Wash. Ct. App. 2001), a decision of the Washington State Court of Appeals, which remains the only authoritative Washington state court decision on the issue. The Appellant contends that the language that appears to support the prior panel opinion is not the holding of the case and that this panel is free to disregard both the language and the prior panel's opinion.

Regardless of whether we would have reached the same decision as the original panel, we cannot say that its decision was clearly erroneous. The prior panel was not so clearly mistaken in its interpretation of the Washington law as to defeat the law of the case. The Washington decision states:

> Here, Elsie was the sole depositor of funds into the account and there is no evidence indicating an intent to transfer a present interest in the funds to Roger. The power of attorney executed by Elsie did not grant Roger the power to make gifts. Roger does not deny that the checks were written two days before Elsie's death. Therefore, Roger had no authority to write the Christmas checks *unless he can introduce evidence that Elsie specifically instructed him to do so.*

Estate of Lennon, 29 P.3d at 1267 (emphasis added).

In view of the already lengthy history of this case, we decline Appellant's suggestion that we certify this case to the Washington Supreme Court for a more authoritative interpretation of the issue.

AFFIRMED.